No. 92-515

In The

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court Of Wisconsin

BRIEF OF PETITIONER

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for criminal conduct if a fact-finder determines that the offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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OPINIONS BELOW

The majority and dissenting opinions of the Wisconsin Supreme Court are set forth in the Joint Appendix (J.A. 26-81) and reported at *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992). The decision of the Wisconsin Court of Appeals is set forth in the Joint Appendix (J.A. 15-25) and reported at *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991).

JURISDICTION OF THIS COURT

The Wisconsin Supreme Court rendered its judgment on June 23, 1992. The petition for certiorari was filed September 21, 1992. This Court granted the petition on December 14, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin penalty enhancement statute:

> **939.645 Penalty; crimes committed against certain people or property.** (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> **(2)**(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Wis. Stat. § 939.645 (1989-90).

STATEMENT OF THE CASE

Statement of Facts Supporting the Conviction

The pertinent facts were summarized by the Wisconsin Supreme Court:

> The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.
>
> Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Reddick, a fourteen-year-old white male, approached the apartment complex. Reddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You

> all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Reddick's direction.
>
> The group ran towards Reddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Reddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

(J.A. 28-29.)

Description of the Penalty Enhancement Statute and Summary of the Proceedings Below

Mitchell was charged with and convicted of felony aggravated battery as a party to a crime. The State also alleged and proved that Mitchell was liable for sentence enhancement under Wis. Stat. § 939.645 (1989-90), the penalty enhancement statute at issue here.

In addition, Mitchell was charged with and convicted of theft as a party to a crime, based on the theft of the tennis shoes. The State charged that Mitchell was liable under the penalty enhancer for that crime, but the jury determined that the State did not meet its burden under the penalty enhancement statute (J.A. 13-14).

The enhancement statute at issue is entitled: "**Penalty; crimes committed against certain people or property.**" It authorizes increased penalties for all crimes in the Wisconsin Criminal Code if the perpetrator "[i]ntentionally selects" the crime victim or targeted property "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that

person or the owner or occupant of that property." Wis. Stat. § 939.645(1)(b) (1989–90).

When applying this law, a trier of fact must first find that a defendant committed each element of a substantive crime in the Wisconsin Criminal Code. The fact–finder then separately renders a "special verdict" on whether the State has proven, beyond a reasonable doubt, "intentional selection" of the crime victim under the penalty enhancement law. Wis. Stat. § 939.645(3) (1989–90) (J.A. 13). The enhancer imposes no mandatory minimum fines or periods of incarceration. The law gives sentencing judges discretion to impose higher penalties for misdemeanors and felonies. For all felonies (from aggravated battery to first degree murder) the enhancer authorizes up to an additional five years in prison.

The jury found Mitchell guilty of felony aggravated battery. The jury separately found, beyond a reasonable doubt, that Mitchell had intentionally selected his battery victim because of the victim's race (J.A. 13, 29). Mitchell's prison exposure for aggravated battery alone was two years. Using the enhancer, the judge imposed a four–year prison sentence.

Mitchell appealed to the Wisconsin Court of Appeals. He claimed the penalty enhancer was unconstitutionally vague and overbroad and that it violated his equal protection rights. The court of appeals rejected his vagueness and overbreadth challenges and found the equal protection claim waived on state procedural grounds (J.A. 17, 18–22).

Mitchell appealed to the Wisconsin Supreme Court. Five of the court's seven justices held that the penalty enhancer punished thought in violation of the First Amendment and was overbroad because it chilled free

speech (J.A. 33, 43). The majority opinion did not address Mitchell's vagueness or equal protection claims. Two justices filed separate dissenting opinions.

SUMMARY OF ARGUMENT

The Wisconsin penalty enhancer does not violate the First Amendment because it does not authorize the punishment of any protected activity and it does not chill speech. Rather, the law authorizes enhanced penalties for criminal conduct that is more serious because it is also an act of discrimination. The law authorizes an increased penalty when a fact–finder (1) determines that a crime has been committed and (2) separately determines that the offender selected his or her victim "because of" the victim's status, such as race.

The operative language of the enhancer (taking an action "because of" the victim's status) is the defining characteristic of all illegal discrimination. Governments may treat two otherwise identical actors differently if the conduct of one actor was motivated by a desire to discriminate against the race, color, ethnicity or other status of the victim. This is true whether the underlying act is legal or illegal.

A statute that defines and sanctions discrimination is not facially invalid under the First Amendment merely because discriminatory acts reflect on violators' beliefs. Wisconsin has no quarrel with, and indeed embraces, the propositions that it "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989), and that it "must remain neutral in the marketplace of ideas," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978). Still, the State has interests in prohibiting and punishing discriminatory conduct that

are unrelated to the suppression of speech or the punishment of beliefs.

The Wisconsin Supreme Court relied on two distinct grounds for finding the Wisconsin penalty enhancer facially invalid under the First Amendment: first, that the enhancer effectively punishes thought; and second, that the enhancer has an impermissible chilling effect on speech because speech evidence will often be used against an offender to prove discriminatory selection. The court is wrong on both counts.

The enhancer does not authorize the punishment of thought

The Wisconsin penalty enhancer identifies a subset of crimes which have a dual nature: they are crimes and they are acts of discrimination. Significantly, this subset is made up of criminal conduct that occurs because of the discriminatory motive of the actor. The white teenager brutally beaten in this case would not have been a crime victim if Todd Mitchell had not been motivated to "'move on some white people'" (J.A. 29).

There is nothing novel about looking to the motive of a criminal offender when determining crime severity and the appropriate criminal disposition. Just last term, this Court addressed the topic in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). This Court explained that at sentencing there is no "*per se* barrier" to evidence concerning beliefs merely because the beliefs themselves are protected by the First Amendment. *Id.* at 1097. This Court suggested that evidence of racial hatred might be admissible at a capital sentencing if "elements of racial hatred" were involved in the killing. *Id.* at 1098. And earlier, in *Barclay v. Florida*, 463 U.S. 939, 949 (1983), this Court approved consideration of the

defendant's underlying motives ("racial hatred" and a "desire to start a race war") because they were relevant to proper sentencing factors. *Id.* at 949. The lesson of *Dawson* and *Barclay* must be that governments may be concerned with an offender's motives and beliefs to the extent they are relevant to a proper issue in a criminal case. Thus, the fact that the Wisconsin penalty enhancer focuses attention on discriminatory criminal motivation does not make it defective.

The Wisconsin legislature has determined that discrimination crimes are likely to involve aggravating circumstances warranting higher penalties. This is precisely the same type of determination a legislature makes when it enacts any other type of penalty enhancer. That is, it determines whether a variable is reasonably associated with an increase in crime severity or offender dangerousness. In this case, the State legislature has legitimate reasons for believing that many discrimination crimes deserve higher penalties. The law does not violate the First Amendment because these reasons have nothing to do with punishing beliefs.

For example, there is no serious dispute that discrimination crimes are on the rise. The *Mitchell* majority itself acknowledged the trend (J.A. 31-32). If a particular type of crime begins to occur more frequently, that fact alone warrants increased penalties to achieve a greater deterrent effect.

Also, discrimination crimes are more likely than other offenses to provoke further crime in the form of retaliatory or copycat crimes. Discrimination crimes invite imitation and retaliation because they are directed not only toward the victim, but at every person who shares the victim's status. These and other factors supporting the enhancer are discussed in the argument section below.

The Wisconsin Supreme Court erred in its First Amendment analysis by failing to canvas all the proper governmental interests which the law advances. The State court almost completely ignored proper interests and singled out what it perceived to be an improper interest, the punishment of motive which it equated with the punishment of pure thought. Notably, the court did not hold, as it might have, that an improper *application* of the statute is the punishment of pure thought. Rather, the court took the extreme step of finding the statute facially invalid. Finally, the court failed to see that the role of motive in the enhancer is precisely the same role motive plays in all anti-discrimination laws.

This Court's recent decision in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), does not govern here. There is a fundamental difference between the St. Paul ordinance, that on its face proscribed *expression* based on the content of the expression and the Wisconsin penalty enhancer that does not on its face, or in effect, proscribe expression, beliefs or thought.

The enhancer does not chill expression

The second reason the Wisconsin court gave for finding the enhancer facially invalid was that it is overbroad. The court found that the law has an indirect chilling effect on activities protected by the First Amendment because people fear that evidence of these activities can be used against them in a prosecution under the enhancer.

A threshold question is whether overbreadth analysis should be applied to the alleged chilling effect of the penalty enhancer. The answer should be no. Thousands of civil and criminal laws make it likely that speech

evidence will be introduced against defendants because the laws directly or indirectly make the motive of defendants a significant issue in litigation. These laws need not be subject to law-by-law scrutiny because the connection between the laws and the asserted chilling effect is too attenuated.

However, if this Court proceeds to consider whether the Wisconsin penalty enhancer has a significant chilling effect on speech, it should answer no to that question. There are two asserted chilling effects: first, a general chilling effect on the entire populous, and second, a chilling effect on criminals while they commit crimes.

As to the first alleged chilling effect, it is unreasonable to believe that citizens in general will censor themselves because they fear they might be prosecuted for a crime under circumstances in which it appears they selected their crime victim because of the victim's status. More fundamentally, throughout the history of our legal system, speech has been used against defendants under innumerable criminal and civil laws, including all anti-discrimination laws, without producing a significant chilling effect.

As to the chilling effect on criminals during the commission of their crimes, the response is that these persons can easily avoid this "chilling effect" by not committing crimes. Furthermore, persons who commit discrimination crimes frequently want their victims to know they are being singled out because of their status. Self-censorship is unlikely because it is self-defeating for these criminals.

Finally, Wisconsin shares the concern that there is the potential for the abusive use of speech evidence in particular cases under the enhancer. But this potential

exists with many laws, as exemplified by the *Dawson* case. The answer is not the drastic step of facial invalidation. Abuses are avoided when litigants and judges are mindful of the proper relevancy limits on the admissibility of evidence, are mindful of the importance of protecting First Amendment activities, and when appellate courts provide the type of guidance this Court provided in *Dawson*.

ARGUMENT

I. THE WISCONSIN PENALTY ENHANCER ADVANCES BOTH THE GOAL OF DETERRING AND PUNISHING ACTS OF DISCRIMINATION AND THE GOAL OF MAKING THE PENALTY FIT THE CRIME AND THE OFFENDER; THE ENHANCER IS NOT FACIALLY INVALID UNDER THE FIRST AMENDMENT BECAUSE IT DOES NOT TARGET, PUNISH, OR SUPPRESS BELIEFS OR EXPRESSION.

A. Introduction.

The first reason the Wisconsin Supreme Court gave for finding the penalty enhancer facially invalid under the First Amendment was that the law effectively authorizes the direct punishment of thought. The court's flawed analysis proceeds as follows: (1) the penalty enhancer is triggered by proof that the offender selected his or her crime victim "because of" the victim's race or other listed status; (2) the most frequent reason an offender targets a status for a crime is prejudice against that status; (3) because criminal laws already authorize penalties for every component of the physical conduct, the enhancer must focus solely on the prejudiced motive for selection; (4) prejudiced motive for

selection is solely a mental process; and, therefore, (5) the enhancer effectively punishes unpopular "thought," that is, prejudiced motivation.

The court's analysis is wrong in several respects, but its primary defect flows from its narrow focus on the issue of motive. Not only does the court examine motive to the exclusion of other legitimate state interests supporting the enhancer, it misanalyzes both the role motive plays in the penalty enhancer and the government's legitimate interests in the motive of a criminal offender.

The proper First Amendment analysis begins with the highly significant observation that the enhancer does not on its face authorize punishment for any constitutionally protected activity. Rather, the enhancer singles out a type of crime: criminal acts that are both crimes and acts of discrimination against the victim. The enhancer simply does not and could not permissibly authorize the punishment of pure thought. There is no doubt that "one may not be imprisoned or executed because he holds particular beliefs." *American Communications Ass'n v. Douds*, 339 U.S. 382, 408 (1950).[1]

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[1]It might be suggested that a First Amendment issue exists because discrimination crimes are themselves expressive conduct. However, if that characterization of the criminal conduct is accurate, an unlimited array of laws is subject to some level of First Amendment scrutiny. Many criminal acts (such as sexual assault and failure to pay income taxes) and virtually all acts of illegal discrimination can be viewed as expression of some type. However, this Court has rejected such an expansive definition of expression: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaged in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Violence and "other types of potentially expressive activities that produce special harms distinct from their communicative impact"

Because the law does not on its face authorize the imposition of punishment for any constitutionally protected activity, the only possible First Amendment inquiry is whether the government has interests in imposing enhanced penalties on discrimination crime offenders that do not relate to the punishment of beliefs or expression. Such legitimate interests exist and they are discussed in detail below. Generally, they relate to the punishment and deterrence of discriminatory conduct and the imposition of punishment that fits both the crime and the offender.

It is important to remember that this statute, or any other, is not facially invalid simply because it might be used in a particular case to punish a protected activity. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946) (an otherwise valid state trespass statute may not be used to punish the distribution of religious literature in a company owned town). If the *Mitchell* court was concerned that a sentencing judge might impose an enhanced penalty under the law for the sole reason that the judge does not like the thoughts of a discrimination crime offender, the court should have stated that such an application of the statute is unconstitutional. But there was no reason to strike the law down on its face.

The *Mitchell* court not only ignored proper governmental interests supporting the law, it also failed to see that the role of motive in the enhancer is precisely the same role motive plays elsewhere in criminal law and the same role it plays in all anti-discrimination laws. In the following sections of this brief, the State will explain why the roles are the same and why the government frequently has a legitimate interest in the

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are not entitled to constitutional protection. *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

motive of an actor. The obvious starting point is a discussion of *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), because those cases make clear that motive, even a racial hate motive, may be a proper governmental concern when deciding whether to impose a more severe sanction, even the death penalty.

B. Motives for criminal conduct, even those involving racial hatred, are a proper governmental concern when they are relevant to a legitimate issue in a criminal proceeding.

1. *Dawson v. Delaware* and *Barclay v. Florida* teach that the First Amendment does not prohibit consideration of a criminal's motives during the sentencing process when those motives are relevant to the commission of the crime or to a proper sentencing factor.

In *Dawson*, a white defendant was convicted of murdering a white female. There was no racial motivation for the murder. This Court held that Dawson's First Amendment rights were violated at sentencing when the government introduced a short stipulation regarding Dawson's membership in a "racist prison gang" called the "Aryan Brotherhood." *Dawson*, 112 S. Ct. at 1098-99. Admission of the stipulation was improper because there was no demonstrated connection between Dawson's membership in a racist gang and his crime or a relevant sentencing factor. *Id.* at 1097-98. This Court explained that "Dawson's First Amendment rights were violated by the admission of the Aryan

Brotherhood evidence . . . because the evidence proved nothing more than Dawson's abstract beliefs." *Id.* at 1098.

At the same time, this Court stated that there is no "*per se* barrier to the admission of evidence concerning one's beliefs . . . at sentencing simply because those beliefs . . . are protected by the First Amendment." *Id.* at 1097. Therefore, this Court explained that the result in *Dawson* might have been different if "elements of racial hatred" were involved in the killing. *Id.* at 1098.

The *Dawson* decision affirmed, in its First Amendment context, an earlier decision that did not involve a First Amendment challenge. In *Barclay v. Florida*, the sentencing judge discussed the racial motive for the murder and compared it with his own experience in World War II. *Barclay*, 463 U.S. at 948. A plurality of this Court approved consideration of the defendant's underlying motives ("racial hatred" and a "desire to start a race war") because they were relevant to proper sentencing factors. *Id.* at 949. As a concluding comment the plurality stated: "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Id.* at 950.

Dawson and *Barclay* teach that a criminal's motive is a proper consideration if it is relevant to a proper sentencing issue, even when that motive also reveals the protected thoughts of the offender and even when the motive is proved through the presentation of speech or associational evidence. For example, it is true that a racial hate motive for a crime shows that the offender holds what most people consider to be despicable beliefs and it is not permissible to punish that offender simply because he holds despicable beliefs. But at the same time a racial hate motive is an excellent indicator of

future dangerousness. It is one thing to batter someone who provokes you in some manner. It is quite different to single out and batter a person walking down the street for no other reason than contempt for the color of his skin. Apart from what the offender's motive says about his beliefs, a state need not ignore what it says about the nature of his act and his future dangerousness.

There is a further lesson that can be gleaned from *Dawson*. This Court properly treated Dawson's First Amendment claim as an "as applied" challenge. This Court did not strike down any part of the Delaware capital sentencing law just because that statutory scheme created the potential that a prosecutor might improperly introduce First Amendment activity evidence and that a jury might improperly recommend the death sentence based on its view of an offender's "abstract beliefs." *Id.* at 1098.

Similarly, there is no reason to strike down the Wisconsin statute. The Wisconsin enhancer is not facially invalid simply because a sentencing judge might consider an improper factor in the course of sentencing an offender. In fact, the chances of abuse are actually less under the enhancer than under the Delaware capital sentencing law. This is true because, unlike the Delaware law, the enhancer focuses attention on issues that are inherently connected to the nature of the offense and the offender's motivation for committing the crime.

2. The Wisconsin Supreme Court wrongly concluded that the Constitution permits a sentencing judge to consider evil motives when setting a penalty within the parameters of a penalty range for an underlying crime, but that consideration of the same motives is impermissible in the context of a penalty enhancer.

The *Mitchell* majority rejected the suggestion that *Dawson* has application to the issue here. It distinguished *Dawson* in the following sentence:

> Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

(J.A. 43 n.17.)

The apparent thrust of this distinction is that it is permissible to consider motive in the context of an underlying penalty range, but impermissible to consider it in the context of an enhancer. The distinction is illogical. If a motivation for an executed crime is "thought," fully protected by the First Amendment (as the court asserts), then there is no reason why such "thought" should enjoy less protection in the context of a sentencing conducted within the penalty range for an underlying crime than it enjoys in the penalty enhancement context. If an offender receives an extra year in prison attributable solely to his or her motive, it is no less a First Amendment violation if that occurs in

the context of the parameters of an existing penalty range or in the context of an enhanced penalty range. The constitutional evil, if there is one, is the improper punishment of protected belief.

Perhaps the Wisconsin court's concern is with the State legislature's role. But there is no federal constitutional requirement as to how the states must apportion sentencing authority between a state judiciary and a state legislature. *See Dreyer v. Illinois*, 187 U.S. 71, 83 (1902). In Wisconsin, the legislature has the power to set specific penalties, penalty ranges and to determine the scope of trial court sentencing discretion. *State v. Borrell*, 482 N.W.2d 883, 890 (Wis. 1992).

It follows that when a legislature enacts a sentencing scheme, including penalty enhancers, it may consider all the same factors sentencing judges themselves consider. The following section presents several factors, unrelated to the punishment of thought or the suppression of speech, that support discrimination crime penalty enhancers.

C. Crimes fueled by discrimination are particularly heinous and deserve higher penalties because they are likely to involve a more severe offense and a more dangerous offender.

The *Mitchell* majority seemingly views a discriminatory motive as just another fungible reason a crime occurs, with no special significance warranting penalty enhancement. But this view ignores the fact that discrimination crimes do not just happen. These perpetrators seek out their victims because of their status.

The elimination of discriminatory conduct is a "compelling state interest[] of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). At the same time, legislatures have broad power to establish penalties and to adapt penal laws to the conditions that exist. *Weems v. United States*, 217 U.S. 349, 379-80 (1910). More particularly, states have the power to enact penalty enhancers that are rationally related to the proper punishment for an offense. *Jones v. Helms*, 452 U.S. 412, 422-24 (1981).

The broad sweep of factors relating to appropriate punishment is discussed in *Williams v. New York*, 337 U.S. 241, 245, 249-51 (1949), where this Court upheld a state policy that encouraged sentencing judges "to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities." In *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court repeated that a sentencing determination "'should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)). In Wisconsin, proper sentencing considerations include the offender's motive, personality, character and social traits. *State v. Harris*, 350 N.W.2d 633, 639 (Wis. 1984).

Several factors support a statutory scheme that gives sentencing judges greater latitude when criminal conduct is prompted by a discrimination motive.

Reprehensible nature of crime

When Todd Mitchell directed a brutal attack on Gregory Reddick simply because Reddick was white and happened to be walking down the street, Mitchell committed a doubly depraved act. It was wrong as an

act of violence, but it was additionally wrong as a violent act of discrimination.

Nothing in the Constitution requires governmental apathy toward the actual degree of depravity of Mitchell's crime just because it might reflect on his constitutionally protected thought. *Cf. R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546-47 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."). There is nothing new about looking into a person's mind to determine the depravity of his act. For example, we deem that a murder motivated by financial profit is more heinous than another otherwise identical murder. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

One legal commentator addressing this topic points to the case of a husband who murders his wife knowing he is the beneficiary of her insurance policy and who files a claim for the benefit. Under these circumstances the husband is still not eligible for the death penalty under the model penal code unless the state can show his primary motivation was pecuniary gain. Thus, two murderers may commit identical acts, down to filing an insurance claim, but only one may be sentenced to death solely because he was motivated by a desire for money. Eric Grannis, Note, *Fighting Words and Fighting Freestyle: the Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178, 192 (1993) (citing *State v. Madsen*, 609 P.2d 1046 (Ariz.), *cert. denied*, 449 U.S. 873 (1980)).

Murderers surely have the constitutional right to believe that life is expendable in the pursuit of money. But when such people act on their beliefs, society may look at their motive to assess the depravity of the act

and the appropriate penalty. Todd Mitchell has a right to hate people because of the color of their skin and the right to express that view in any number of ways protected by the First Amendment. But he had no right to harm Gregory Reddick because of the color of Reddick's skin.

The logical extension of the *Mitchell* decision is that a discrimination motive has greater constitutional protection than a financial motive. Under the reasoning of *Mitchell*, when a person beats someone because of the victim's skin color, the government must ignore the motive when assessing the nature of the act. But when an offender beats someone because the offender desires money, the government may consider the motive to assess the crime and the penalty.

This position is untenable in light of the states' compelling interest in rooting out discriminatory conduct. *See Roberts*, 468 U.S. at 623. The Constitution places no value on discriminatory acts, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), and the only feature which differentiates discriminatory acts from other acts is the motive of the actor. There is simply no reason the Constitution forbids our elected representatives or the judiciary from making the value judgment that discriminatory acts have a particularly depraved nature.

Retribution is a proper aim of criminal law. *Furman v. Georgia*, 408 U.S. 238, 308 (1992) (Stewart, J., concurring). While retribution is no longer the dominant object of criminal law, it is neither forbidden nor inconsistent "with our respect for the dignity of men." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (citations omitted). The Wisconsin penalty enhancer certainly is consistent with our respect for the dignity of all people, regardless of race, ethnicity or other status. Criminal acts take on a heinous quality simply because they are

motivated by a desire to discriminate. It follows that society has a retribution interest in punishing discrimination crime.

Deterrence

The *Mitchell* majority acknowledges the obvious, that the Wisconsin Legislature was motivated by a "desire to suppress hate crimes" (J.A. 48). Deterrence, of course, is a proper governmental goal of both criminal laws, *Harmelin v. Michigan*, 111 S. Ct. 2680, 2704 (1991) (Kennedy, J., concurring), and civil anti-discrimination laws, *Smith v. Wade*, 461 U.S. 30, 54 (1983).

Furthermore, violations that occur with increasing frequency merit penalties with a greater deterrent effect. *State v. Smith*, 302 N.W.2d 54, 57 (Wis. Ct. App. 1981); *see also Weems v. United States*, 217 U.S. 349, 379 (1910). There is no serious dispute that discrimination crimes are occurring with greater frequency. Even the *Mitchell* majority states: "Statistical sources indicate that incidents of all types of bias related crime are on the rise" (J.A. 31). *Cf. People v. Grupe*, 532 N.Y.S.2d 815, 819-20 (1988) (court relied on state task force finding that bias-related crime was increasing).

The United States Congress has also recognized the need to address bias related crime. On April 23, 1990, it enacted the "Hate Crime Statistics Act of 1990." The act requires the collection of data on crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity. Congress was responding to "disturbing signs that the number of hate crimes has skyrocketed in this country." 135 Cong. Rec. H3179 (1989) (statement of Rep. Schumer, supporting the Hate Crimes Statistics Act).

Prompts additional crime

Discrimination crimes are more likely than other crimes to provoke further crime in the form of retaliatory crime or copycat crimes. *State v. Plowman*, 838 P.2d 558, 564 (Or. 1992), *petition for cert. filed* November 23, 1992. They invite imitation and retaliation because they are directed not only toward the victim, but toward the victim's entire group. *Id.* Incidents across the country have given grave testimony to this sad fact. For example, retaliatory crimes were prompted by a 1992 attack in New York City in which a group of white youths squirted white shoe polish on the faces of a black teen-age boy and his 12 year old sister. *See* Lynda Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, January 28, 1992; *see also State v. Beebe*, 680 P.2d 11, 13 (Or. Ct. App. 1984) (discrimination crimes commonly "escalate from individual conflicts to mass disturbances").

Future dangerousness of offender

The future danger posed by an offender is a proper sentencing concern. *See Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). It is entirely reasonable to believe that offenders who are motivated to commit crimes because of discrimination are generally more likely than other offenders to pose a danger of repeat criminal behavior. Their motivation is not situational. Rather, the fact that they acted criminally on a discriminatory motive indicates such beliefs are deeply seated and will prompt more criminal activity in the future. It can accurately be said, for example, that many gay bashers view themselves at war with all gays and will likely continue the "fight" unless severely sanctioned.

An offender's lack of remorse is also an indicator of future dangerousness. *State v. Harris*, 350 N.W.2d 633, 639 (Wis. 1984). *See also Roberts v. United States*, 445 U.S. 552, 556-57 (1980) (failure of offender to cooperate in investigation of related criminal acts indicated a refusal to "'shape up and change his behavior'"). It is certainly reasonable to assume that offenders who commit crimes because of discrimination are less likely than most offenders to feel true remorse. After all, in most cases it was an elevated disdain for the basic rights of the targeted group which prompted the crime in the first place.

There is quite a difference between punishing someone for holding a belief and finding that an offender is dangerous because he or she has a demonstrated propensity for acting unlawfully on that belief. The State's legitimate interest is the latter.

Effects on targeted group

There is no doubt that legislatures may address the "public injury" caused by crime. *See Coker v. Georgia*, 433 U.S. 584, 597-98 (1977); *see also United States v. Grayson*, 438 U.S. 41, 46 (1978); *State v. Tew*, 195 N.W.2d 615, 619 (Wis. 1972). In particular, special attention may be given to crimes that undermine a "community's sense of security." *Coker*, 433 U.S. at 598 (insecurity of women caused by rape).

When discrimination crimes occur, members of the targeted group feel a loss of security. Importantly, this damage to the targeted group exists regardless whether the offender intended to send any message through his or her criminal act. For example, if a group of white youths in a high school single out a particular minority member for a beating, many and perhaps all students in

that minority group will feel unsafe. Several may alter their habits to avoid the perceived danger. This damaging effect occurs apart from any message the offenders intended to send.

Moreover, discrimination crimes frequently occur when a victim enters a neighborhood where the offender thinks the victim does not belong. The cumulative effect of such crimes is to make whole neighborhoods inaccessible to people based on status. *See* Jack McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983-1987)*, at 8 (November 1989).[2] *See also* Gregory M. Herek & Kevin T. Berrill, *Hate Crimes*, at 71 (1992) (people construct mental "safety-maps").

Effects on the victim

Criminal law has long taken into account the emotional harm suffered by a victim when imposing punishment. This practice has even been upheld in death sentence cases. *Payne v. Tennessee*, 111 S. Ct. 2597, 2604 (1991) ("emotional harm" is a proper sentencing consideration in a capital case, without regard to blameworthiness of offender). This Court has recognized, for example, that rape causes "mental and psychological damage" to victims in addition to physical injury. *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977).

Similarly, Wisconsin law recognizes the propriety of considering the fear and terror suffered by a crime victim. *State v. Teynor*, 414 N.W.2d 76, 88 (Wis. Ct. App. 1987). The fact that such fear may be induced in

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[2]A copy of this unpublished document has been lodged with the clerk for the convenience of the Court.

the course of the crime by verbal threats does not insulate the offender. *See, e.g., Ocanas v. State*, 233 N.W.2d 457, 462-63 (Wis. 1975).

In the civil anti-discrimination context, this Court has recognized that psychological harm was a concern of Congress when it enacted Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986). In the course of determining the coverage of Title VII, this Court rejected the claim that Congress was only concerned with tangible losses of an "'economic character,'" and not psychological harm. *Id.* at 64. This Court repeated with approval a lower court's statement: "'One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.'" *Id.* at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

There appears to have been only limited research on the topic of discrimination crime, but at least one study found that victims of violent discrimination suffer greater emotional harm. Victims of ethnic violence suffered 21% more symptoms of stress than victims of similar acts of non-ethnic violence. Joan C. Weiss, et al., *Ethnoviolence at Work*, 18 J. of Intergroup Relations, 20, 27-28 (No. 4, Winter, 1991-92). These symptoms included sleep problems, trouble concentrating, more alcohol use, a desire to hurt people who hurt you, and feelings of helplessness. *Id.* at 27.

These legitimate interests support the penalty enhancer

The above sections demonstrate that proper governmental goals, unrelated to the suppression of

speech or the punishment of thought, are advanced by the discrimination crime penalty enhancer. As dissenting Justice Abrahamson states: "when individuals are victimized because of their status, such as race or religion, the resulting harm is greater than the harm that would have been caused by the injurious conduct alone" (J.A. 50). She recognizes that the State "has legitimate, reasonable and neutral justifications for selective protection of certain people" and that these justifications are present "even when the conduct is linked to viewpoints otherwise protected by the First Amendment" (J.A. 50). *Accord State v. Beebe*, 680 P.2d 11, 13 (Or. Ct. App. 1984).

The Wisconsin penalty enhancer no more authorizes the punishment of pure thought than does the Delaware capital sentencing statute addressed in *Dawson*. While both laws make the motive of the offender an issue, neither authorizes the punishment of a constitutionally protected right. And in both cases, legitimate governmental interests justify the laws.

The above discussion shows the fallacy in the *Mitchell* majority's conclusion that the enhancer creates a unique context in which thought is isolated and punished. In the next section, the State addresses certain erroneous statements of the *Mitchell* majority that suggest there are other constitutionally significant differences between the enhancer and other anti-discrimination laws.

D. The Wisconsin Supreme Court failed to recognize that the Wisconsin penalty enhancer is a true anti-discrimination law and the court erroneously relied on a distinction between "motive" and "intent."

1. The operation of the Wisconsin penalty enhancer.

Under the Wisconsin penalty enhancer, higher penalties are authorized, but not required, if an action is taken against a victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis. Stat. § 939.645(1)(b) (1989-90). The predicate action under the enhancer is a criminal offense. A trier of fact must first find, beyond a reasonable doubt, that a defendant committed each element of a crime. Wis. Stat. § 939.645(1)(a) (1989-90). The fact-finder then separately renders a "special verdict" on whether the State has proven, beyond a reasonable doubt, "intentional selection . . . because of" the status of the crime victim. Wis. Stat. § 939.645(3) (1989-90) (J.A. 11-12, 13).

It is certainly true that the penalty enhancer is an example of the Wisconsin Legislature singling out a particular subset of crime for special treatment. This is not unusual. Legislatures routinely single out types of crime for penalty enhancement.

For example, Wisconsin and other states provide greater penalties when a battery victim is a police officer. Wis. Stat. § 940.20(2) (1989-90). These laws are not facially invalid under the First Amendment simply because such batteries frequently demonstrate the offenders' contempt for law enforcement. Instead, penalty enhancement for batteries against police officers

and for discrimination crimes are facially valid under the First Amendment for a deceptively simple reason. On their faces, neither type of law requires or authorizes the punishment of any protected First Amendment activity. And in both instances, the government is concerned with what the enhancement variable says about the dangerousness of the offender and severity of the crime, not with suppressing or punishing speech or thought.

2. "Because of" selection is the key feature of both the Wisconsin enhancer and all other anti-discrimination laws.

The language that triggers penalty enhancement under the Wisconsin statute (action "because of" a particular status) is either literally or functionally the same as language that triggers liability under hundreds of civil rights and anti-discrimination laws. These laws impose liability when an actor takes some action "because of" the race, religion or other specified status of the affected person.[3]

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[3]*See, e.g.*, Title VII as amended by 42 U.S.C. § 2000e-2(a)(1) (prohibiting various employment actions "because of [the employe's] race, color, religion, sex, or national origin"); 42 U.S.C. § 3604 (prohibiting interference with housing choices "because of [the victim's] race, color," or other listed status); and Wis. Stats. §§ 111.321-.322 (prohibiting employment actions "because of" age, race, or other listed status); *see also Bray v. Alexandria Women's Health Clinic*, 61 U.S.L.W. 4080 (U.S. January 13, 1993) (the "animus" requirement of 42 U.S.C. § 1985(3), demands "at least" proof of "a purpose that focuses upon [victims] *by reason of their [status]*").

Discriminatory motive plays exactly the same role in both the enhancer and other anti-discrimination laws. In both cases, the presence of discriminatory motive *alone* affects the sanction imposed on conduct. In the penalty enhancer context, the existence of a discriminatory motive is the difference between a higher or a lower maximum penalty. Under other anti-discrimination laws, the existence of a discriminatory motive is the difference between liability and no liability at all. *E.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (under the *disparate treatment* theory, proof of a discriminatory motive is critical).

The *Mitchell* court admits, as it must, that anti-discrimination laws are "concerned" with motive. But the court claims that civil anti-discrimination laws do not carry punitive sanctions and that the motivation of the civil offender does not affect the sanction imposed (J.A. 46-48 n.21). Both assertions are wrong.

Although anti-discrimination laws are primarily remedial in nature, some do authorize punitive sanctions for the purposes of punishment and deterrence. For example, both federal and Wisconsin fair housing laws authorize punitive damages. 42 U.S.C. § 3613(c)(1); *Rogers v. Loether*, 467 F.2d 1110, 1112 (7th Cir. 1972), *aff'd*, *Curtis v. Loether*, 415 U.S. 189 (1974); Wis. Stat. § 101.22(6m)(a); *Chomicki v. Wittekind*, 381 N.W.2d 561 (Wis. Ct. App. 1985); *see also Smith v. Wade*, 461 U.S. 30, 54 (1983) (discussing the nature of punitive damages and relying on Restatement (Second) of Torts § 908(1) (1979)); *Brown v. Freedman Baking Co., Inc.*, 810 F.2d 6, 11 (1st Cir. 1987) (punitive damages are an appropriate means of punishing and deterring racially discriminatory employment practices). Punitive damages may "embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the

likelihood of its recurrence, and the extent of defendant's wrongful gain," *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991). In fact, Chief Justice Rehnquist has noted that punitive damages are "'quasi-criminal'" in nature. *Smith*, 461 U.S. at 59 (Rehnquist, J., dissenting) (quoting *Huber v. Teuber*, 10 D.C. 484, 490 (1877)). In addition, both federal and Wisconsin laws authorize the imposition of civil monetary penalties. 42 U.S.C. § 3614(d)(1)(C), and Wis. Stat. § 101.22(10)(d) and (6)(h)3.

Furthermore, the motives of civil anti-discrimination law violators do affect the available sanctions. In Wisconsin punitive damages are available in fair housing actions if a plaintiff shows a defendant acted out of "hatred," "ill will" or "a desire for revenge." *See* Wis. JI-Civil 1707 (1992), and *Chomicki v. Wittekind*, 381 N.W.2d 561, 565 (Wis. Ct. App. 1985). Likewise, under 42 U.S.C. §§ 1981 and 1983, a prevailing plaintiff may, in addition to other remedies, receive punitive damages if the defendant's conduct is shown to be motivated by malice, "evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. *See also Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988). This issue "typically demands inquiry into the actor's subjective motive and purpose." *Smith*, 461 U.S. at 61-64 (Rehnquist, J., dissenting).

Another distinction the *Mitchell* majority relies on is its assertion that anti-discrimination laws carry only civil penalties, in contrast with the penalty enhancer, which increases a criminal penalty (J.A. 46-48 n.21). However, this "distinction" ignores federal anti-discrimination laws that carry criminal sanctions. *See, e.g.*, 18 U.S.C. § 245 (prohibiting interference with certain rights "because of [the victim's] race, color,

religion or national origin") and 42 U.S.C. § 3631 (criminalizing interference with housing choices "because of" a listed status of the victim).

Furthermore, Professor James Weinstein points out that this Court has long recognized that the issue in First Amendment cases is not the civil or criminal nature of the law in question, but whether the regulation in fact suppresses or penalizes protected activities. James Weinstein, *First Amendment Challenges to Hate Crimes Legislation: Where's the Speech?* 11 Crim. Just. Ethics No. 2, at 14-15 (Summer/Fall 1992). He relies on *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), where this Court said: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."

It is not surprising that the *Mitchell* majority fails to answer the telling question of dissenting Justice Bablitch. He asks: "How can the Constitution not protect discrimination in the marketplace when the action is taken 'because of' the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken 'because of' the victim's status?" (J.A. 54). The obvious answer is that it does not.

3. The distinction between motive and intent has no constitutional significance.

The *Mitchell* majority apparently believes the enhancer is defective because it is defined in terms of "motive" and not "intent." However, the "intent/motive" distinction is a red herring (J.A. 35-39). First, it is questionable whether there is a principled distinction

between "intent" and "motive." *See* Jeffrie Murphy, *Bias Crimes: What Do Haters Deserve?*, 11 Crim. Just. Ethics No. 2, at 20–23 (Summer/Fall 1992).

Second, it is a simple matter to characterize the enhancer requirement (selection "because of" the status of the victim) as "intent" and the reason that prompts the selection (such as racial hate) as the "motive." Writing on this topic, Professor LaFave gives the following example: "when *A* breaks into *B*'s house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive." Wayne R. LaFave & Austin W. Scott, *Criminal Law* § 3.6, at 228 (2d ed. 1986). Put in these terms, Todd Mitchell's purpose of singling out Reddick because of race was his intent. A desire to show hatred of whites may or may not have been his motive. Thus, the enhancer does not define iteself in terms of "motive."[4]

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[4]What the State must prove at trial to show "because of" selection has never been in serious dispute in this case. Under any reasonable definition of "because of," there can be no doubt that Todd Mitchell selected his victim because of race. The majority in *Mitchell* never endeavored to define the term "because of." However, in the context of rebutting Todd Mitchell's vagueness claim, dissenting Justice Bablitch did provide a definition which is consistent with discrimination law generally. He said the State was required to prove that the victim's status was a "substantial factor in the selection decision to the extent that in the absence of that status the perpetrator would not have selected the victim" (J.A. 71). He summarized: "When the victim's protected status . . . is a substantial factor in the defendant's purposeful choice of a victim, the statute becomes operative" (J.A. 74). The majority does not take issue with this description. Rather, the majority erroneously concludes that this description describes "motive." The majority states:

The third, and most important reason, the "intent/motive" distinction is a red herring is that it has no constitutional significance. There is no reason to suppose that the Constitution forbids a legislature from defining a crime in terms of motive. For example, a capital sentencing scheme that authorizes the death penalty if an offender is motivated by a desire for money does not violate the Constitution. *Jurek v. Texas*, 428 U.S. 262 (1976). Plainly, the desire for money is a motivation in the very same sense the *Mitchell* majority considers racial hate to be a motive. Therefore, even if the intentional selection of a crime victim because of the victim's status is considered to be the codification of a "motive," there is no constitutional deficiency for that reason.

Accordingly, the Wisconsin Supreme Court erred in several respects. It wrongly saw the enhancer as effectively punishing thought, it failed to consider legitimate state interests that support the enhancer, it did not recognize that the enhancer is an anti-discrimination law, and it relied on an erroneous view of "motive." In the following section, the state explains why the court's reliance on *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), was misplaced.

> [The confusion over motive] is manifested clearly in the dissenting opinion of Justice Bablitch, which correctly defines "intentionally" . . . as "a purpose to do the thing or cause the result specified," correctly recognizes . . . that the term "because of" implicates an actor's motive, and somehow concludes that the hate crimes statute involves ordinary criminal intent.

(J.A. 37 n.11.)

E. The penalty enhancer is not facially invalid under *R.A.V. v. City of St. Paul*, because the law does not prohibit expression; rather, it enhances the available criminal penalties for criminal conduct directed at certain persons or groups.

The St. Paul ordinance reviewed in *R.A.V.* prohibited a subset of expressive "fighting words" based on the content of the expression. The St. Paul City Council singled out and prohibited only those "fighting words" that communicated certain types of group hatred. *Id.* at 2548. This approach ran afoul of the First Amendment's "'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.* at 2545.

In *R.A.V.*, this Court's concern was that the St. Paul ordinance proscribed a particular type of *speech*, that is, "messages of racial, gender, or religious intolerance." *Id.* at 2549. Although the "fighting words" covered by the ordinance are generally "unprotected," they are speech nonetheless and governments may not favor some speech over other speech. *Id.* at 2543.

The importance of the law's direct prohibition on speech was further underscored when this Court differentiated laws that proscribe speech from laws that protect persons or groups:

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition

> of fighting words that contain . . . messages of "bias-motivated" hatred.

Id. at 2548 (emphasis in original). Accordingly, a law that prohibits fighting words directed at persons because of their race or ethnicity would be facially valid if it met the requirements of the Equal Protection Clause.

The Wisconsin penalty enhancer is yet another step removed from the above hypothetical law because it does not regulate *expression* directed at certain persons; rather, it deals with *criminal conduct* directed at certain persons. It contains no requirement, express or implicit, that punishment be enhanced because of any particular message sent by the criminal conduct. Indeed in the instant case, the prosecutor never attempted to prove that Todd Mitchell sent Gregory Reddick a "message." The availability of penalty enhancement was triggered by discriminatory selection without regard to whether a message was sent or intended.

The same analysis rebuts any argument that the Wisconsin penalty enhancer is a content based prohibition on thought. The enhancer does not require proof of any mental process beyond intentional selection because of status. There is no requirement that the State prove, for example, that the offender hated members of the targeted status. As the State has often pointed out, Todd Mitchell might have been motivated by a desire to appear tough and rebellious to impress his peers. But the fact that Todd Mitchell may. not hate whites does not diminish the seriousness of his crime.

The above discussion shows there is a fundamental difference between the St. Paul ordinance and the Wisconsin penalty enhancer. The St. Paul ordinance was struck down on its face because it was directed at expression; it differentiated prohibited from non-

prohibited expression and did so based on the content of messages conveyed. The Wisconsin enhancer is directed at discriminatory criminal conduct. Its differentiation is based on whether the criminal act is targeted at an individual because of the person's status. The Wisconsin law does not single out any belief or type of message a criminal might communicate by his or her crime. It can be "'*justified* without reference to the content of" the offender's thought or expression. *R.A.V.*, 112 S. Ct. at 2546 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

II. THE WISCONSIN PENALTY ENHANCER HAS NO SIGNIFICANT CHILLING EFFECT ON SPEECH.

If this Court agrees with the State that the Wisconsin penalty enhancer does not directly punish activities protected by the First Amendment, it must nonetheless address the Wisconsin Supreme Court's independent justification for finding the enhancer facially invalid. The Wisconsin court held that the enhancer is overbroad because it has the ancillary effect of chilling free speech. The court believes protected activities, such as speech, are chilled because people know that evidence of such activities can be used against them in a criminal prosecution involving the enhancer (J.A. 33, 44–46).

To bring the *Mitchell* majority's argument into clearer focus, it is exactly the same argument that might be applied to any law which directly or indirectly makes motive, intent or knowledge an issue. In every disparate treatment employment discrimination action, the employer's motive is an issue and with high frequency that motive is demonstrated by the employer's speech. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

Criminal laws themselves frequently make motive an issue. In virtually every first degree murder case the killer's intent or motive is an issue and the evidence presented on those topics is often the killer's own speech. As Justice Bablitch explained in his dissent, "It is no more a chilling of free speech to allow words to prove the act of intentional selection in this 'intentional selection' statute than it is to allow a defendant's words that he 'hated John Smith and wished he were dead' to prove a defendant intentionally murdered John Smith" (J.A. 60).

In the next section, the State suggests that overbreadth analysis ought not be applied to this asserted indirect chilling effect. In the remaining section, the State explains why there is no significant chilling effect.

A. Laws that do not regulate expression in some manner should not be subject to overbreadth analysis.

An important threshold question is whether the claimed chilling effect on speech is an overbreadth issue at all. A typical overbreadth challenge involves a law that, in addition to proscribing unprotected activities, can also be applied to protected activities. *E.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Broadrick v. Oklahoma*, 413 U.S. 601, 606–07 (1973). But the *Mitchell* court's concern here is not that the statute is overbroad because it can be applied to protected expression. It is concerned that **proper** applications of the statute, and indeed the very existence of this otherwise proper statute, have an incidental chilling effect. The State has not found a single case in which this Court has applied overbreadth analysis to a regulation with such an indirect effect on speech.

The point here is not that laws like the Wisconsin penalty enhancer will wither under overbreadth analysis; they can certainly withstand examination. The point is that the myriad of laws which make motive (or other mental states) an issue should not be subjected to law-by-law scrutiny in the first place. Any other conclusion leads to the absurd result that First Amendment overbreadth analysis is required for every law that directly or indirectly makes motive an issue. *Cf. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 708 (1986) (O'Connor, J., concurring). There is no reason to open that floodgate.[5]

B. Even if this Court chooses to examine the Wisconsin penalty enhancer for overbreadth, it will find no significant chilling effect.

Declaring a statute invalid on its face because of overbreadth is "strong medicine" that should be used by courts with hesitation and then "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). When a statute, like the one here, seeks to regulate conduct, the "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

The *Mitchell* majority held that the Wisconsin penalty enhancer is overbroad because the use of a defendant's

[5]*Cf. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991), in which Justice Scalia opined that the challenged law did not merit First Amendment scrutiny at any level because on its face it was a "general law regulating conduct and not specifically directed at expression." He states that a "general law" is one that regulates "without regard to whether that conduct is expressive." *Id.* at 2465 n.3 (Scalia, J., concurring).

words as circumstantial evidence to prove intentional selection at trial chills speech and other activities protected by the First Amendment. The court was concerned that the entire population is chilled because people cannot be sure they will not some day be charged under the penalty enhancer (J.A. 45-46). This general chilling effect is allegedly caused by the specter of a criminal proceeding that scrutinizes a lifetime of speech and other First Amendment activity. *Id.* The court was also worried that the penalty enhancer chills criminal offenders from uttering epithets during their crimes (J.A. at 44-45).

As to the court's concern with a general chilling effect on society, the State has two replies. First, it is improbable, to say the least, that citizens will think: "I better not read this book (or speak these words) because some day I might be charged with a criminal offense under circumstances in which it appears I selected my victim because of the victim's status." It is implausible that any significant number of people would alter their habits based on the possibility of being charged with a crime involving discrimination.

Second, if the chilling effect argument of the *Mitchell* majority is valid, it applies equally to criminal prosecutions generally and to lawsuits under countless other civil and criminal anti-discrimination laws. This Court has pointed out that in Title VII actions, an employer's "stereotyped remarks" regarding a female employee "can certainly be *evidence* that gender played a part" in a negative employment action. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Thus, speech evidence has long been introduced in both civil and criminal courts for the very same reasons it is most frequently relevant under the Wisconsin enhancer statute: to prove motive and intent.

Relevant speech and association evidence is commonly admitted at trial with explicit consideration of its impact on First Amendment rights[6], and without such consideration.[7] Likewise, courts often exclude irrelevant speech evidence without specific mention of

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[6]*United States v. Abel*, 469 U.S. 45 (1984) (evidence of the defendant's beliefs and his affiliation with the Aryan Brotherhood properly admitted on issue of defendant's credibility); *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979) (upholding decision to admit a book into evidence while recognizing "the sensitive nature of First Amendment values"); *Jordan v. Wilson*, 662 F. Supp. 528 (M.D. Ala. 1987), *rev'd on other grounds*, 851 F.2d 1290 (11th Cir. 1988) (statements made by mayor and police chief to the press).

[7]*See generally United States v. McInnis*, 976 F.2d 1226 (9th Cir. 1992) (in a prosecution under 42 U.S.C. § 3631(a), items seized from defendant's home with racist symbols and words admitted to show defendant's motive was racial hatred); *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1990) (evidence in discrimination crime prosecution that defendant asked to join a "skinhead" picnic admitted to show defendant would act on his beliefs); *United States v. Johns*, 615 F.2d 672 (5th Cir.), *cert. denied*, 449 U.S. 829 (1980) (evidence of affiliation with the Ku Klux Klan admitted to prove racial animus); *United States v. Franklin*, 704 F.2d 1183 (10th Cir.), *cert. denied*, 464 U.S. 845 (1983) (speech evidence showing defendant hated blacks offered to prove racial motive); *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989) (evidence of membership in white supremacist hate group and speech admitted to prove victims were selected because of their race); *United States v. Redwine*, 715 F.2d 315 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984) (defendant's prior statements admitted to prove he acted with racial intent when firebombing the home of a black family); *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986) (evidence of anti-Oriental statements admitted to prove racial motive for killing).

the First Amendment.[8] Speech evidence is not admitted wholesale; it must be relevant to an issue and its probative value must outweigh any improper prejudicial effect. *See* Fed. R. Evid. 402 and 403, and Wisconsin counterpart rules: Wis. Stats. §§ 904.02 and 904.03 (1989–90).

The admission of speech evidence has not led to a trampling of First Amendment rights. For example, employer speech has long been used by employees to prove labor violations under the National Labor Relations Act. But there is no suggestion that employers have censored their speech because it could be used against them. "Employers have actively campaigned against unions in the face of the [National Labor Relations] Board's practice of considering those lawful campaigns as background evidence to determine unlawful motive." Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act*, 53 Ohio St. L.J., at 35–36 (1992).

Perhaps more to the point here, no one would suggest that the National Labor Relations Act is invalid on its face because employer speech is frequently used as evidence under the act. "'[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, ***evidenced***, or carried out by means of language, either spoken, written, or printed.'" *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (emphasis added)

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[8]*See generally United States v. McCrea*, 583 F.2d 1083 (9th Cir. 1978) (trial court erred in admitting two books into evidence); *Ebens*, 800 F.2d at 1433 (prejudicial and erroneous admission of racial statements because they were too general and too remote in time).

(quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

As to the chilling effect on criminals who wish to utter epithets during the commission of a crime, the State responds twofold. First, it is easy to avoid this alleged chilling effect: do not commit a crime! Similarly, "those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden." *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468 (1991) (Scalia, J., concurring).

Second, it is unrealistic to believe there is any significant chilling effect on a person who is already committing a criminal act, that is, one who is already undeterred by the prospect of a criminal prosecution for the underlying crime. In fact, self-censorship frequently defeats a central goal of the offender: letting victims know they are being singled out on account of status. The youths who form a roving band of "gay bashers" want their victims to know and feel their contempt. The person who vandalizes a Jewish temple wants to demonstrate his disdain for Jewish people and will, accordingly, use derogatory words or symbols that show the temple was not a random target. It is sadly ironic that self-censorship is unlikely precisely because it is self-defeating.[9]

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[9]In an attempt to bolster its chilling effect holding, the *Mitchell* majority asserts that the penalty enhancer is applicable when "A strikes B in the face" and adds a single word such as "'nigger,' 'honkey,' 'jew,' 'mick,' 'kraut,' 'spic,' or 'queer'" (J.A. 44). But if this is all that is known, the State cannot prove intentional selection based on status. The statute does not authorize penalty enhancement for speaking an epithet or having contempt for a victim because of their status. The State must prove the offender selected "because of" the status, and that proof is not present every time a racial, ethnic or other epithet is uttered during the commission of a crime.

The *Mitchell* majority's claim, that First Amendment rights will be stifled by the use of speech at the trial stage, presumably extends to the sentencing phase of a criminal proceeding as well. But just as this assertion is unfounded when applied to the trial portion of a criminal proceeding, it is without merit at sentencing. As discussed in section I. of this brief, this Court held in *Dawson* that activities protected by the First Amendment may be used as evidence at sentencing if sufficiently related to the crime committed. *Dawson v. Delaware*, 112 S. Ct. 1093, 1098 (1992).[10] But if the *Mitchell* majority is correct, this Court should have held that evidence of activities protected by the First Amendment is *per se* inadmissible at sentencing because admission has a chilling effect on the exercise of such rights.

The routine use of speech evidence (in the absence of a discrimination crime penalty enhancer) inevitably

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[10]*See also Barclay v. Florida*, 463 U.S. 939 (1983) (upholding the trial court's consideration of a black defendant's association with the Black Liberation Army in sentencing him to death for his murder of a white victim); *State v. J.E.B.*, 469 N.W.2d 192, 200 (Wis. Ct. App. 1991), *cert. denied*, 112 S. Ct. 1484 (1992) (finding no First Amendment violation where the trial court considered the defendant's reading materials at sentencing because of the nexus between the crime committed and the content of the reading materials); *cf. Commonwealth v. Abu-Jamal*, 555 A.2d 846, 859 (Pa. 1989), *cert. denied*, 111 S. Ct. 215 (1990) ("Punishing a person for expressing his views or for associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry.")

leads to an observation the *Mitchell* majority has steadfastly ignored. That is, even if Wisconsin had never enacted a discrimination crime penalty enhancer, Todd Mitchell's speech would have been admitted at his trial to prove his crime and his motive. Additionally, Mitchell's words could have been introduced at sentencing to shed light on the true nature of his crime and the danger he poses to the community. Since his speech could have been used against him in the absence of an enhancer, it cannot be seriously argued that Todd Mitchell, or anyone else, is chilled by the existence of a discrimination crime penalty enhancer.

The Wisconsin penalty enhancer has no significant chilling effect on speech. Todd Mitchell had the right to think whatever he wished. He could have expressed those thoughts in countless ways protected by the First Amendment. But he had no right to direct an attack on Gregory Reddick because of the color of Reddick's skin. The State was entitled to view his act as a criminal act of discrimination and punish it accordingly. The Wisconsin penalty enhancer is valid on its face and should be affirmed by this Court.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be vacated and the case remanded.

Respectfully submitted,

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